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Supreme Court of the United States

OCTOBER TERM, 1944

No. 288

THOMAS BASS, ... Petitioner

vs.

COMMONWEALTH OF KENTUCKY, Respondent

On Petition for Writ of Certiorari to The Court of Appeals of Kentucky

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RESPONSE AND BRIEF FOR RESPONDENT, COMMONWEALTH OF KENTUCKY

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Supreme Court of the United States

OCTOBER TERM, 1944

No. 288

THOMAS BASS..... *Petitioner,*

VS.

COMMONWEALTH OF KENTUCKY,.....*Respondent*

ON THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

RESPONSE AND BRIEF FOR RESPONDENT, COMMONWEALTH OF KENTUCKY

JURISDICTION

Respondent, at the outset of its brief, must take issue with the Petitioner's statement that a substantial, or any federal question, was properly, or at all, presented in the court below. When this court examines the briefs and petition for rehearing in the Court of Apeals of Kentucky, it will find that the Petitioner never raised any constitutional question in the lower court, nor objected or excepted to the introduction of the confession so strenuously attacked in his petition herein. The Court of Appeals of Kentucky noted and commented on this in its decision, which we will hereinafter quote.

It was argued that a failure of the lower court to instruct the jury as to whether the confession was voluntary violated Section 7 of the Kentucky Constitution, guaranteeing a jury trial, but that is as far as the issue below was

raised in the Kentucky Court of Appeals. The Court of Appeals fully answered this in its decision.

The question of a violation of the various sections of the Federal Constitution was raised for the first time in the petition to this court. However, we will show there is no merit in this contention even if it had been raised and considered below.

THE ISSUES RAISED AND OPINION OF KENTUCKY COURT

We will, for this court's convenience, quote from the opinion below, Bass v. Commonwealth, 296 Ky. 426; 177 S. W. (2d) 386, rendered by the Chief Justice as follows:

> "It is at once apparent that the evidence was amply sufficient to sustain the verdict. It would have been so even in the absence of the confession. Having admitted the killing, it was incumbent on the appellant to justify it and the jury were not bound to accept his uncorroborated statement that he acted in self-defense, particularly since well established facts, such as the finding of the hammer in the weeds and the torn pocketbook behind the wood box, tended strongly to indicate the falsity of his story. Another such circumstance is that there was no other evidence that Brown had a pistol on his person and the pistol was actually found between the mattress and bed springs in his room.
>
> "It is argued with great earnestness that the trial court was in error in deciding the issue as to the admissibility of the confession and that he should have submitted to the jury the question whether it was obtained in violation of the Anti-Sweating Act, KRS 422.110.
>
> "Passing the question that there was no objection interposed to the introduction of the confession and no motion to exclude it after its introduction, it is clear that the court properly passed on this question himself rather than submit it to the jury. In view of the present statute, KRS 422.110, we are at a loss to understand the insistance with which this question is presented since the statute clearly vests this function

in the trial judge. Prior to the enactment of Chapter 141 of the Acts of 1942 it was the function of the jury to determine, under appropriate instructions, the admissibility of a confession claimed by the accused to have been obtained in violation of the Anti-Sweating Act, but the purpose of the 1942 amendment was to abolish this practice and to vest this function in the trial judge. This identical question was decided in Herd v. Commonwealth, 294 Ky. 154, 171 S. W. (2d) 32."

Then follows the decision that the section of the Kentucky Statutes involved, KRS 422.110, did not violate Section 7, of the Constitution.

Neither the petition herein, page 4, nor the brief, page 9, set out fully the language of the stature, but omit the pertinent part of same, or amendment 1942, whereby the section reads as follows:

"422.110 (1649b-1 to 1649b-3 Confession obtained by "sweating" not admissible. (1) No peace officer, or other person having lawful custody of any person charged with crime, shall attempt to obtain information from the accused concerning his connection with or knowledge of crime by plying him with questions, or extort threats or other wrongful means, nor shall the person having custody of the accused permit any other person to do so.

(2) A confession obtained by methods prohibited by subsection (1) is not admissible as evidence of guilt in any court. *The trial judge shall determine the competency and admissibility of any alleged confession under the provisions of this section from evidence heard by him, independent of and without the hearing of the jury trying the case.*"

We have italicized the part of the statute omitted from Petitioner's quotation.

The procedure in the lower court authorized above by statute was literally and conscientiously followed. (Typewritten Transcript, Volume II, pages 32-42). The court's ruling on page 42 reads as follows:

"Thereupon the Court rendered the following opinion:

The Court. After hearing the testimony in chambers, the Court is of the opinion that the confession and statements made by the defendant were entirely voluntary and in no way coerced."

No objection was made to the introduction of the confession, nor exception taken to its introduction, nor motion to exclude it ever made.

The motion for a new trial after conviction did not make it a ground for a new trial (Tr. 7), and this is practically admitted in the petition herein (Page 2), where the only two grounds for a new trial were that the verdict was flagrantly against the evidence, and alleged misconduct of Commonwealth's Attorney in his final argument.

In view of the above, the very ground for the petition herein fails, and it presents no federal question raised below, and the admissibility of the confession was never questioned below.

STATEMENT OF THE CASE

The court need but read the summary of the evidence and the lower court's opinion to see that this was a brutal and unprovoked murder for the purpose of robbery.

The brief and petition refer to Petitioner as "a negro youth from the deep south," when according to his own testimony, he was a man twenty-seven years of age, from North Carolina.

According to his testimony, he seems to have overstayed his leave of absence from his camp upon the idea he could stand the punishment with imprisonment inflicted. The apparent motive for murdering this old inoffensive negro man, sixty years of age, was for money to entertain and regale himself and his women companions, especially with liquor.

As the opinion below states, independent of the confession, his own admission of the killing, with the finding

of the hammer used and torn pocketbook from which the contents had been taken, were enough evidence to take the case to the jury and authorize his conviction. His whole theory of self-defense is refuted by this admission with competent facts otherwise proved. The gun he claims was about to be used by the deceased on him was in fact found after the killing, between the mattress and bed springs in the old man's room. Certainly, the deceased after being struck, could not have put the pistol there. The amount of money found in Petitioner's possession after arrest, corresponded with the amount he confessed taking from the deceased at the time of the striking. The defenseless state of deceased, as shown by his exclamation heard by a witness in an adjoining room, "Aw, don't hit me," further shows a cruel and unprovoked attack.

He admits that the confession is partly true, but seems to especially object to the part stating the purpose of the striking was robbery which he claims was coerced, though admitting that the part as to the killing was substantially true.

The confession does not bear any earmarks of being dictated. It was a plain, simple narrative statement, such as an ordinary man would make.

ARGUMENT AND AUTHORITIES

Petition and brief wholly omit and ignore that part of the Kentucky Statute involved herein, to-wit:

> "The trial judge shall determine the competency and admissibility of any alleged confession under the provisions of this section from evidence heard by him, independent of and without the hearing of the jury trying the case."

As the State Court pertinently remarks in its opinion in view of this statute,

> "We are at a loss to understand the insistence with which this question is presented since this statute clearly vests its function in the trial judge."

The brief for Petitioner even charges the trial court on page 5 of same, with "arrogating to itself the determination of the voluntariness of the alleged confession." This court, no doubt, will agree with the Kentucky Court in its failure to understand the raising of this question, both in the State court and on petition to this court.

Under the statute, it was the mandatory duty of the lower court to decide this question which it did. In view of this statute, to require the court to instruct the jury to determine whether the court's ruling as a matter of law was proper, seems an absurdity, but this is what the argument of Petitioner amounts to.

This is no new question as a dozen or more states, in the absence of a statute such as the Kentucky Statute, have held that whether a confession is voluntary or not is a question of law subject to exception and appeal if erroneous, and it was improper to instruct the jury to determine this question of law. One of the leading cases is State of New Jersey v Eugene Compo, 108 N. J. L. 499; 158 Atl. 541; 85 A. L. R. 866, where the New Jersey Supreme Court decided this identical question as follows:

> "The charge of the court, in so far as it did not direct the jury to reject the confession if they believed the same was not voluntary, is before us and under the decisions of this court such an instruction would have been erroneous. If the jury did not believe in the truth of the confession, they could treat it in the same manner as any other piece of evidence which they disbelieved, but they could not decide to reject, as evidence, that which the court had properly admitted. Of course, the determination of the weight and credibility of evidence is always for the jury, and the trial judge left that question to the jury.
>
> The judgment is affirmed."

In People v. Fox, 319 Ill. 606, 150 N. E. 347, where the same question was presented, the Illinois Supreme Court held as follows:

> "While the jury may consider the circumstances under which a confession was made, in order to deter-

mine the credit to be given to it (People v. Gukouski (1911) 250 Ill. 231, 95 N. E. 153, Ann. Cas. 1912B 297; Zukerman v. People (1904) 213 Ill. 114, 72 N. E. 741), on elementary principles defining the functions of judge and jury, the question of competency of the confession must not be submitted to the jury. To a like effect, see People v. Costello (1926) 320 Ill. 79. 150 N. E. 712."

In Moss vs. State, 19 Ala. App. 85, 96 So. 451, wherein a writ of certiorari was denied, the Alabama court reviewed its former decisions, and again stated and laid down the rule in Alabama that the voluntariness of a confession was solely for the court, holding erroneously the charge of the trial judge authorizing the jury to reject and disregard the confession if they found it to be not voluntary.

Again in Indiana, in Hauk v. State, 148 Ind. 238, 46 N. E. 127, it was held upon the same question that the voluntariness of a confession was only addressed to the court, and the defendant was not entitled to have the jury pass on it. This same rule is laid down in a dozen or more states in addition to the foregoing, and we will not burden this court with other state authority on the matter.

Some states take an opposite view of this, where there is no statute on the question, but Kentucky, which was formerly in that class, has now departed from it, and is in line with foregoing cases.

This court will note that in the opinion complained of, the Kentucky court reviews the Kentucky decisions and holds that the orthodox rule was to the effect that the voluntariness of the confession was for the court, and not the jury. However, in later decisions, the Kentucky Court took what the opinion states was the "heterodox" rule, and it would seem even in the absence of the mandatory statute, the Kentucky Court intended to go back to the old orthodox rule wherein the voluntariness of a confession was a question of law for the court and not a question of fact for the jury. Whether this conclusion is justified or

not, the statute is conclusive and binding, and the construction of a statute by a state court is followed by this court. This is the general rule.

This Court will notice that every Kentucky case cited in Petitioner's brief were also cited in the opinion under the "heterodox" rule, and decided prior to the Statute.

This Court can see that Sections 7 and 11 of the Kentucky Constitution are practically the same as the 5th and 6th amendments of the Federal Constitution. Both guarantee to the accused a jury trial with the requirement that he be confronted with his witnesses and not required to incriminate himself, and that the trial be by an "impartial jury of the vicinage," not "imperial jury of the viccinage," as quoted on Page 7 of the Petitioner's brief.

This Court will bear in mind that only Section 7, of the Kentucky Constitution was involved in the trial either in the lower court or the Kentucky Court of Appeals. No mention was made in the petition for rehearing in the Kentucky Court of Appeals of any other section than Section 7. As we have stated above, the first mention of the Federal sections is in the petition for writ of certiorari in this court, and we insist, in view of this failure to present this question, the petition should be denied. The Kentucky Court of Appeals held that it did not violate Section 7 of the Kentucky Constitution, and that was the only question raised, and upheld the Kentucky Statute in this regard.

It is now insisted that Amendment XIV of the Federal Constitution was violated, in that the Petitioner was denied due process of law, and several cases of this Court are cited, none of which have a bearing on this case, nor are similar in fact to this case.

There is a difference in the consideration by this Court of a conviction in a Federal Court and conviction in a State Court where raised on petition for writ of certiorari. In criminal convictions in the State Court, the power of this court is limited to the enforcement of fundamental principles of liberty and justice, while in reviewing the convic-

tions in a Federal Court this court is not confined to ascertainment of constitutional validity. The case of McNabb vs. U. S., 318, U. S. 332, 63 Sup. Ct. 608, was a review of a conviction in the Federal Court, and in the McNabb Case, this court followed and cited the case of Hebert v. La. 272 U. S. 312, 47 Sup. Ct. 103. This Court can see under the facts of this case in the matter of the confession, there was no violation of the "fundamental principles of liberty and justice," and the trial court and the Kentucky Court of Appeals so expressly held.

One of the cases relied on in Petitioner's brief is Ashcraft v. State of Tennessee, 64 Sup. Ct. 921, which this court did review. Neither the lower court nor the Supreme Court of Tennessee passed on the question of whether the confession was freely and voluntarily made. We will quote from this opinion the following language:

> "The record discloses that neither the trial court nor the Tennessee Supreme Court actually held as a matter of fact that petitioners' confessions were "freely and voluntarily made." The trial court heard evidence on the issue out of the jury's hearing, but did not itself determine from that evidence that the confessions were voluntary. Instead it over-ruled Asheraft's objection to the use of his alleged confession with the statement that, "This Court is not able to hold, as a matter of law, that reasonable minds might not differ on the question of whether or not that alleged confession was voluntarily obtained." and it likewise over-ruled Ware's objection to use of his alleged confession, stating that "the resonable minds of twelve men might * * * differ as to * * * whether Ware's confession was voluntary, and * * * therefore, that is a question of fact for the jury to pass on." Nor did the State Supreme Court review the evidence pertaining to the confessions and affirmatively hold them voluntary. In sustaining the petitioners' convictions, one Justice dissenting, it went no further than to point out that, "The trial judge * * * held * * * he could not say that the confessions were not voluntarily made and, therefore, permitted them to go to the jury," and to declare that it, likewise,

was "unable to say that the confessions were not freely and voluntarily made."

This alone distinguishes the case at bar from the Ashcraft case which is no precedent in this case.

Petitioner also cites and quotes from Chambers v. State of Florida, 309 U. S. 227, 60 Sup. Ct. 472. The Chambers case presented a most unusual and extreme condition of facts. In that case, the accused was grilled for five days and all of one night of the fifth day. They denied their guilt. There were threats of mob violence and they were in constant fear of mob violence. It seems that the question of confession was not passed on at the first trial in the lower court, but came up on a writ of coram nobis, and the Supreme Court of Florida reversed the case twice.

This Court in granting the petition and ordering a trial, based it upon the conclusion "the undisputed facts showed compulsion was applied". There is no such undisputed facts showing a compulsion in the case at bar. In fact, all the proof before the lower court was that it was a voluntary confession and the defendant never excepted to the orders of the court to this effect, but on the trial, repudiated a part of the confession and claimed the part pertaining to robbery was coerced. There is no parallel or similarity between this case and the facts in the Chambers case.

It was for the jury to determine under his testimony at the trial, whether to believe his statement on the trial or the statement in the confession, a pure question of credibility as any other question of fact to be left to the jury.

Let this Court bear in mind in Kentucky there is a direct statute on this, while in the cases cited by Petitioner, no statute was involved. We have reviewed the decisions of this court to show they are wholly inapplicable to the case at bar.

For the first time in this petition, the question is raised as to the legality of the arrest, and certain sections of the Criminal Code of Kentucky are cited. The legality and reg-

ularity of the arrest were never questioned in the lower court, nor was the question ever raised in the Kentucky Court of Appeals. There is nothing to show that the Petitioner objected to the arrest or questioned its regularity, or the fact he was not taken before the examining court. Petitioner's attorneys seek to raise this for the first time in this petition which, of course, cannot be done as no opportunity was given the lower court or the Kentucky Court of Appeals to pass on it, and it is purely an afterthought as we can properly and reasonably conclude.

CONCLUSION

Respondent, The Commonwealth of Kentucky, therefore, respectfully submits that no Federal question was ever raised, either in the trial court or the Kentucky Court of Appeals; that the only question raised, to-wit, the violation of Section 7, of the Kentucky Constitution, and whether the Kentucky Statute violated this section was expressly passed on in the Court of Appeals of Kentucky. This Court will follow a State Supreme Court's construction of the State's own statutes.

The record further shows that the punishment inflicted and upheld, while extreme, was merited.

We, therefore, respectfully ask that the petition for certiorari be denied.

Respectfully submitted,

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